

E.F., Appellant

**U.S. POSTAL SERVICE, POST OFFICE,
New York, NY, Employer**

Appearances:

Paul Kalker, Esq., for the appellant¹

Office of Solicitor, for the Director

Case Submitted on the Record

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

ALEC J. KOROMILAS, Alternate Judge

VALERIE D. EVANS-HARRELL, Alternate Judge

On June 21, 2018 appellant, through counsel, filed a timely appeal from a May 22, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act² (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.³

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² 5 U.S.C. § 8101 *et seq.*

³ The Board notes that following the May 22, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "the Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$23,335.74 because he concurrently received Office of Personnel Management (OPM) retirement benefits while receiving FECA compensation benefits for the period October 15, 2017 through March 31, 2018; and (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

FACTUAL HISTORY

This case has previously been before the Board.⁴ The facts and circumstances as presented in the prior Board decision are incorporated herein by reference. The relevant facts are as follows.

On December 23, 2007 appellant, then a 53-year-old electronic technician/mechanic, filed an occupational disease claim (Form CA-2) alleging that his heavy work duties caused herniated discs and related conditions. He stopped work on April 2, 2008 and did not return. OWCP accepted cervical radiculopathy, and cervical and lumbar sprains.

By letter dated September 25, 2008, OWCP informed appellant that he was being placed on the periodic compensation rolls. It explained that he would receive regular payments beginning September 28, 2008 and every 28 days thereafter. OWCP's September 25, 2008 letter also included a Form EN1049 which informed appellant of his rights and responsibilities as a FECA benefits recipient. On the subject of retirement, the EN1049 advised appellant as follows:

“You must report any retirement income, disability income, or compensation benefits from any [f]ederal agency. This is because a recipient of compensation benefits under FECA is not permitted to receive benefits under certain other [f]ederal programs including the Civil Service retirement program.”

OWCP referred appellant for vocational rehabilitation services in 2009.

Appellant elected Office of Personnel Management (OPM) retirement benefits effective July 15, 2011.⁵

⁴ Docket No. 11-1268 (issued March 13, 2012).

⁵ By decision dated October 13, 2010, OWCP reduced appellant's wage-loss compensation based on his capacity to earn wages as a maintenance supervisor, effective October 24, 2010. It found that appellant had a 25 percent loss of wage-earning capacity (LWEC). On March 16, 2011 OWCP denied modification of the October 13, 2010 decision. Following an appeal to the Board, by decision dated March 13, 2012, the Board found that the medical evidence record did not establish that the position of maintenance supervisor was within appellant's restrictions and reversed the October 13, 2010 LWEC determination. Docket No. 11-1268 (issued March 13, 2012). On May 12, 2012 appellant elected FECA benefits, effective July 15, 2011. OWCP returned appellant to the periodic compensation rolls effective March 10, 2013 and paid retroactive compensation from August 31, 2012 to March 9, 2013. By decision dated August 1, 2014, OWCP reduced appellant's wage-loss compensation based on his actual earnings as a full-time college instructor. On February 25, 2015 OWCP paid appellant retroactive compensation for the period July 31, 2011 to January 31, 2012. By decision dated January 4, 2016, OWCP vacated the August 1, 2014 LWEC determination because the position on which it was based was not regular, full-time employment.

In correspondence dated January 4, 2016, OWCP requested that OPM provide information as to whether appellant was in receipt of OPM benefits. On May 12, 2016 OPM informed OWCP that appellant was in receipt of OPM benefits.

On May 18, 2016 counsel informed OWCP that appellant would like to elect FECA rather than OPM benefits. By letter dated August 12, 2016, OWCP informed appellant of the evidence needed before it could return him to the periodic compensation rolls.

On an EN1032 form, signed by appellant on August 17, 2016, appellant indicated that he was receiving disability retirement benefits from OPM.

By letter dated October 4, 2017, OWCP informed appellant that, based on his counsel's correspondence, it concluded that he wished to receive FECA benefits rather than OPM disability retirement benefits. It noted that, although it had not received requested documentation to accurately determine the amount of compensation and to ensure that no overpayment was created, it had decided to place him on the periodic compensation rolls effective immediately since by decision dated January 4, 2016 it was found that he had been improperly removed from the periodic compensation rolls based on an improper LWEC determination.⁶ OWCP continued that it would further develop appellant's entitlement to compensation for the timeframe December 13, 2014 to September 16, 2017. It provided appellant an election Form CA-1105.

On October 4, 2017 OWCP returned appellant to the periodic compensation rolls, effective September 17, 2017. It noted that it was returning him to the periodic rolls at his counsel's request and that additional information was needed from OPM regarding benefits appellant had received and/or was receiving.

In a CA-1105 dated November 1, 2017, appellant elected FECA benefits for the period December 13, 2014 to October 14, 2017, and OPM retirement benefits from October 15, 2017 onward.

On November 10, 2017 appellant forwarded information to OWCP. An OPM annuity statement dated November 1, 2017 indicated that appellant received a gross monthly annuity of \$1,730.00 less life, health, dental, and vision insurance for a net benefit of \$1,292.29 and that his benefit payments would continue on a monthly basis. Appellant also included handwritten documentation of benefits he received from OWCP and OPM from December 2014 through November 2017.

On an EN1032 form signed by appellant on February 20, 2018, he indicated that he was receiving OPM retirement, Social Security Administration (SSA) retirement benefits, and service-related Department of Veterans Affairs (VA) benefits. OWCP terminated appellant's FECA periodic rolls compensation on March 31, 2018.

By letter dated April 6, 2018, OWCP informed OPM that appellant had elected OPM benefits effective October 15, 2017 and, as OWCP had paid FECA benefits for the period October 15, 2017 through March 31, 2018, OPM should reimburse OWCP \$23,335.74.

⁶ *Id.*

On April 12, 2018 OWCP issued a preliminary determination that an overpayment of compensation in the amount of \$23,335.74 had been created for the period October 15, 2017 through March 31, 2018. It explained that the overpayment occurred because appellant received both FECA benefits and OPM retirement benefits during this period. He was found at fault because he accepted a payment he knew or should have reasonably known was incorrect. OWCP provided an overpayment action request and overpayment recovery questionnaire (OWCP-20). It afforded appellant 30 days to respond. An overpayment worksheet and computer print-outs documented that appellant received FECA compensation in the amount of \$23,335.74 for the period October 15, 2017 through March 31, 2018.

Appellant, through counsel, disagreed with the preliminary overpayment determination. Counsel noted that on January 4, 2016 OWCP had vacated its August 1, 2014 LWEC determination yet had still not paid appellant retroactive compensation based on the LWEC determination. He maintained that appellant remained significantly underpaid since he had not been paid appropriate retroactive compensation. An overpayment action request, signed by appellant on April 23, 2018, indicated that he disagreed that the overpayment occurred and disagreed with the amount of the overpayment. He submitted the first page only of the overpayment questionnaire and again maintained that no overpayment had occurred. Appellant referred to counsel's January 4, 2016 correspondence.

A telephone memorandum dated May 22, 2018 noted that an OWCP claims examiner spoke with appellant and informed him that he was responsible for the overpayment which would be deducted from his retroactive payment for past due wage loss.

By decision dated May 22, 2018, OWCP finalized the overpayment, finding that an overpayment of compensation in the amount of \$23,335.74 had been created for the period October 15, 2017 through March 31, 2018. It found him at fault because he accepted a payment he knew or reasonably should have known was incorrect.

LEGAL PRECEDENT -- ISSUE 1

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.⁷ Section 8116(a) states that while an employee is receiving workers' compensation benefits, he or she may not receive salary, pay, or remuneration of any type from the United States, except in return for services actually performed or for certain payments related to service in the armed forces, including benefits administered by the VA, unless such benefits are payable for the same injury or the same death being compensated for under FECA.⁸

Section 10.421(a) of OWCP's implementing regulations provides that a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity.⁹

⁷ 5 U.S.C. § 8102(a).

⁸ *Id.* at § 8116(a).

⁹ 20 C.F.R. § 10.421(a).

The beneficiary must elect the benefit that he or she wishes to receive.¹⁰ OWCP procedures also explain that the employee must make an election between OWCP benefits and OPM benefits. The employee has the right to elect the monetary benefit which is the more advantageous.¹¹

ANALYSIS -- ISSUE 1

The Board finds that an overpayment of compensation in the amount of \$23,335.74 was created for the period October 15, 2017 through March 31, 2018 because appellant concurrently received FECA wage-loss compensation and OPM retirement benefits for this period.

On November 1, 2017 appellant elected retroactive FECA benefits from December 13, 2014 to October 14, 2017 and OPM retirement benefits beginning October 15, 2017. The record indicates that appellant began receiving FECA benefits on the periodic compensation rolls commencing September 17, 2017, continuing through March 31, 2018. He provided a November 1, 2017 OPM annuity statement which indicated that he received a continuing monthly benefit. There is no evidence of record that OPM benefits stopped. OWCP calculations show that appellant received \$23,335.74 in FECA compensation for the period October 15, 2017 through March 31, 2018 when it was terminated.

As a beneficiary may not receive wage-loss compensation concurrently with a federal retirement or survivor annuity,¹² an overpayment in compensation was created.¹³ The clear language of section 8116(a) of FECA, section 10.421(a) of OWCP's implementing regulations, and OWCP procedures prohibits the receipt of FECA wage-loss benefits and a federal annuity.¹⁴ Appellant received \$23,335.74 in FECA compensation while concurrently receiving OPM retirement benefits. Therefore, as appellant had elected OPM retirement benefits for the period of the overpayment, October 15, 2017 through March 31, 2018, an overpayment of compensation in that amount was created for this period.¹⁵

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and

¹⁰ *Id.*

¹¹ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Dual Benefits*, Chapter 2.1000.4.a (January 1997); *see also* R.S., Docket No. 11-0428 (issued September 27, 2011); *Harold Weisman*, Docket No. 93-1335 (issued March 30, 1994).

¹² *Id.*

¹³ *See C.H.*, Docket No. 18-0772 (issued November 14, 2018); *Franklin L. Bryan*, 56 ECAB 310 (2005).

¹⁴ 5 U.S.C. § 8116(a); 20 C.F.R. § 10.421(a), Federal (FECA) Procedure Manual, *supra* note 11.

¹⁵ *See C.H.*, *supra* note 13; *compare John Wolf*, 54 ECAB 586 (2003) (employee elected FECA compensation rather than OPM retirement benefits for the period of the overpayment).

when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.”¹⁶

Section 10.433(a) of OWCP regulations provides that OWCP:

“[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits.... A recipient who has done any of the following will be found to be at fault in creating an overpayment:

(1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or (2) Failed to provide information which he or she knew or should have known to be material; or (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual).”¹⁷

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual’s capacity to realize that he or she is being overpaid.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that appellant was at fault in the creation of the \$23,335.74 overpayment of compensation for the period October 15, 2017 through March 31, 2018.

OWCP found appellant at fault because he knowingly accepted compensation to which he reasonably should have known she was not entitled.

In its September 25, 2008 letter notifying appellant that he would receive periodic compensation, OWCP included an EN1049 form. This clearly advised that a person who received compensation benefits under FECA was not permitted to receive OPM retirement benefits concurrently with FECA payments. Moreover, in its letter dated October 4, 2017, OWCP informed appellant that, since he wished to receive FECA benefits rather than OPM disability retirement benefits, although it had not received requested documentation to accurately determine the amount of compensation and to ensure that no overpayment was created, it had decided to place him on the periodic compensation rolls effective immediately. It continued that it would

¹⁶ *Id.* at § 8129; *see M.O.*, Docket No. 18-0686 (issued January 25, 2019); *Linda E. Padilla*, 45 ECAB 768 (1994).

¹⁷ 20 C.F.R. § 10.433(a); *see also* 20 C.F.R. § 10.430.

¹⁸ *Id.* at § 10.433(b); *C.H.*, *supra* note 13; *Neill D. Dewald*, 57 ECAB 451 (2006).

further develop appellant's entitlement to compensation for the time frame December 13, 2014 to September 16, 2017 and attached an election form.

Appellant was therefore on notice that dual benefits from OPM and FECA were a prohibited benefit. He however elected OPM benefits on October 15, 2017, but continued to receive FECA benefits until March 31, 2018.

The Board finds appellant at fault under the third standard, as he accepted compensation which he knew or should have known he was not entitled to receive.¹⁹ As such, he is not entitled to waiver of recovery of the \$23,335.74 overpayment of compensation.²⁰

With respect to recovery of the overpayment, the Board's jurisdiction is limited to reviewing those cases where OWCP seeks recovery from continuing compensation benefits under FECA.²¹ As appellant is no longer receiving wage-loss compensation, the Board does not have jurisdiction with respect to the recovery of the overpayment under the Debt Collection Act.²²

As to counsel's assertion on appeal, the record establishes that appellant is entitled to retroactive FECA compensation for the period August 14, 2013 through May 22, 2014, as noted by OWCP in its May 22, 2018 decision. In that decision, OWCP informed appellant that after the amount of this wage loss was calculated, some or all of the \$23,335.74 overpayment would be deducted from the retroactive benefit payment. At no point did either counsel or appellant assert that they thought the monthly FECA payments were for retroactive compensation. Rather, they merely asserted that an overpayment was improper because appellant was entitled to retroactive compensation. OWCP did not issue a final decision within 180 days of this appeal regarding appellant's entitlement to retroactive compensation. As such, the Board does not have jurisdiction over this matter.²³

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$23,335.74 because he concurrently received OPM retirement benefits while receiving FECA compensation benefits for the period October 15, 2017 through March 31, 2018. The Board further finds that appellant is at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment.

¹⁹ See *S.U.*, Docket No. 17-1281 (issued April 2, 2018).

²⁰ See *E.M.*, Docket No. 17-1987 (issued July 25, 2018).

²¹ *C.H.*, *supra* note 13; *Cheryl Thomas*, 55 ECAB 610 (2004).

²² *Id.*

²³ 20 C.F.R. § 501.2(c); see generally *S.B.*, Docket No.14-1672 (issued August 12, 2015).

ORDER

IT IS HEREBY ORDERED THAT the May 22, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 13, 2019
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board